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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of PORTER AUTO GROUP, L.P., Protestant, v. FCA US LLC, Respondent.	**Protest Nos. PR-2534-17, PR-2535-17, PR-2536-17, PR-2537-17, PR-2555-18, PR-2556-18, PR-2557-18, PR-2558-18** **REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS PROTESTS, OR, IN THE ALTERNATIVE, FOR A FINDING OF GOOD CAUSE TO TERMINATE BASED ON UNCONTESTED EVIDENCE**

Robert E. Davies and Mary A. Stewart of the law firm of Donahue Davies, LLP, Post Office Box 277010, Sacramento, California 95827, and Michael S. Elvin and Jack O. Snyder, Jr. of the law firm Barack, Ferrazzano, Kirschbaum & Nagelberg, LLP, 200 West Madison Street, Suite 3900, Chicago, Illinois 60606, hereby reply in support of the March 30, 2018 Motion to Dismiss Protests, or, in the Alternative, for a Finding of Good Cause to Terminate Based on Uncontested Evidence

("Motion") on behalf of Respondent FCA US LLC ("FCA US"), and in so doing respond to the April 13, 2018 brief filed in opposition ("Opposition") by the Porter Auto Group, L.P. ("Porter").

INTRODUCTION

Porter's optimism in the face of its dire financial circumstances is not relevant to this proceeding. The Protests are, as pointed out in the Motion, moot; there is no dealership to be preserved, and there is no reasonable prospect of one. In response to FCA US's voluminous and uncontested evidence that Porter has no dealership, no facility, no operations, no inventory, no equipment, no license, and millions of dollars in debt, Porter tries to avoid a finding of mootness by offering nothing more than a declaration from Vincent Porter making vague and unsupported promises of raising money and reopening in the future. Porter offers no signed agreements, third-party affidavits, or other concrete evidence substantiating any prospect that Porter has any ability to pay down its staggering debt, recapitalize, acquire a dealership premises and inventory, and resume operations as a motor vehicle dealer. Porter's unsupported hopes are not relevant, and cannot be enough to overcome the uncontested evidence that renders the Protests moot.

Furthermore, the existence of good cause as a matter of law is a second and independent ground to dismiss the Protests. In its Opposition, Porter does not contest the underlying facts that show good cause. Instead, despite clear precedent to the contrary, it argues that the Board lacks the *authority* to issue such an order. Under the law as announced by the California Court of Appeals, implied authority exists to dismiss a protest where, as here, the facts showing good cause are undisputed. Porter does not, and cannot, offer evidence that it has in fact been operating as a motor vehicle dealer for the past eight months. No future plans can cure the fact that Porter has been out of business for this long, or rectify the fact that Porter has neither been able to serve the public nor the vehicle brands that it agreed to represent. Thus, Porter's subjective hopes are not merely insufficient as evidence; they are irrelevant.

SUMMARY OF PROCEDURAL POSTURE AND BRIEFING TO DATE

On September 5, 2017, FCA US issued notices of termination to Porter for the Chrysler, Dodge, Jeep, and RAM vehicle lines that Porter represented (the "September Notices"). The September Notices came after Porter was evicted from its former dealership facility ("Dealership Premises") on August 23, 2017, and were based on Cal. Veh. Code § 3060(a)(1)(B)(v) (providing for termination upon failure to

operate for seven consecutive days) and other material breaches of Porter's dealer agreements with FCA US. Porter filed the protests to these on September 22, 2017 (the "September Protests"), and the protests were subsequently consolidated. *See* Protest Nos. PR-2534-1, P-2535-17, PR-2536-17, PR-2537-17. On February 15, 2018, FCA US issued additional notices of termination to Porter (the "February Notices"). The notices were based on six additional grounds beyond those outlined in the September Notices: (1) Porter's failure to maintain the licensure necessary to fulfill its obligations under the Dealer Agreement; (2) Porter's failure to maintain adequate net worth; (3) Porter's failure to timely submit financial statements; (4) the impairment of Porter's financial standing and the financial standing of its owners and/or executives; (5) the insolvency of Porter; and (6) Porter's failure to meet its advertising and sales promotion obligations. Porter filed protests to each of the February Notices on March 14, 2018 (the "March Protests"). On March 27, 2018, the Board consolidated the September Protests and the March Protests (collectively, the "Protests").

On March 30, 2018, FCA US filed the instant Motion. The Motion argues, first, that as shown by the uncontested evidence attached to it in support, the Protests are moot because Porter has no dealership operations, licensure, or premises, and the Board cannot provide any relief that would restore Porter to operation. Second, the Motion demonstrates, again on the basis of such evidence, that Porter's situation mandates dismissal based on a finding of good cause as a matter of law.

In its Opposition, Porter raises two central arguments: (1) that the Protests are not moot because Porter "has every intention of resuming operations," and (2) that the Board cannot issue a finding of "good cause" at this stage in the Protests, regardless of the evidence. In a footnote, Porter also disputes that the loss of its dealer license has any "bearing on whether this matter should be dismissed." (Opposition at 2 n.1.)

ARGUMENT

As set forth herein, each of Porter's arguments is without merit.

Porter's Mootness Argument. Porter first argues that the Protests are not moot under *Duarte & Witting, Inc. v. New Motor Vehicle Board*, 104 Cal. App. 4th 626 (Ct. App. 2002) and *Mega RV Corp. d/b/a McMahons RV v. Roadtrek Motorhomes, Inc.*, Protest No. PR-2245-10, at ¶ 18 (N.M.V.B. Aug. 23, 2012) ("*Roadtrek*"). Even though those cases make clear that dismissal is appropriate here, Porter

tries to distinguish them, arguing, *first*, that *Roadtrek* was not designated "precedential" by the Board, so it is not binding; *second*, that *Roadtrek's* reasoning is inapplicable here because Porter intends to reopen; and *third*, that *Duarte* only stands for the idea that the Board has no remedy in vehicle-line discontinuation cases. These arguments misconstrue *Roadtrek* and *Duarte*, and do not refute the inevitable conclusion that the Protests are moot because there is no Porter dealership to be preserved by sustaining a protest.

Regardless of whether *Roadtrek* was designated as a "precedent" decision, its facts and reasoning are directly applicable to the Protests, and persuasively demonstrate why the Protests must be dismissed. Porter, like the dealer in *Roadtrek*, has lost its dealership premises and it "appears that there is little or no likelihood that the [] dealership could re-open at that location." *Roadtrek* at ¶ 18. Accordingly, in such a situation, there is no point to a hearing or to any relief that the Board could offer the dealer, as none of that fulfills any of the "practical considerations called for in the statutory scheme." *Roadtrek* at ¶ 63.[1] Thus, Porter's self-serving claim that it "has every intention of resuming operations" (Opposition at 4) is not relevant. Intention to reopen is of no relevance where the dealership is so far gone that, like Porter's former dealership and the ones at issue in *Roadtrek*, there is little to no chance of reopening.

In the Motion, FCA US presented overwhelming proof that there was little to no possibility of the Porter dealership reopening (let alone at the Dealership Premises), including but not limited to Porter's eviction from the Dealership Premises, loss of its dealer license, millions of dollars in debt pursued through litigation uncontested by Porter, and – most recently – a court-ordered surrender of the former dealership's inventory, equipment, and other items. In response, Porter offers a declaration from Vincent Porter, attesting that he has "diligently worked" to find investors and has secured commitments

[1] In its attempt to distinguish *Roadtrek*, Porter misquotes it. Porter states: "it was undisputed by the dealer 'the Scotts Valley dealership has already closed and ***that*** there was no indication that it will or can be re-opened . . . .'" (Opposition at 3-4 (misquoting *Roadtrek* at ¶ 43) (emphasis ours).) This is not correct. Porter inserts a "that" where one does not appear in the quoted passage. Rather, the opinion states "it is undisputed that the Scotts Valley dealership has already closed *and there was no indication* that it can be re-opened . . . ." *Roadtrek* at ¶ 43 (emphasis ours). Porter's interposed "that" flips the meaning of the phrase: in the opinion as written, the dealership's *closure* was the "undisputed" proposition, while there was simply "no indication" that the dealership would reopen. In any event, for the reasons discussed herein, Porter's declaration cannot change the fact that there is no indication that the Porter dealership will reopen.

from four qualified dealers from other states. (Opposition at 3-4, Porter Decl., at ¶ 3-4.) At best, this "evidence" speaks only to Mr. Porter's unfounded optimism, which is not relevant to this proceeding.

Porter's declaration does not contest any of the evidence presented by FCA US, let alone any of the evidence about Porter's failure to operate, its eviction, its unpaid debts, or its licensing. Instead, the declaration focuses on unsubstantiated claims about so-called financial "commitments" and offers a vague promise to reopen the dealership. In short, Porter's declaration is not evidence at all, and would not suffice to create an issue of fact sufficient to defeat a motion for summary judgment. *See Sinai Mem'l Chapel v. Dudler*, 231 Cal. App. 3d 190, 196–97 (Ct. App. 1991) ("An issue of fact can only be created by a conflict of evidence. . . . Further, an issue of fact is not raised by *cryptic, broadly phrased, and conclusory assertions, or mere possibilities*." (internal quotations and citations omitted) (emphasis ours).

Indeed, Porter fails to attach any documents (let alone signed agreements) to the declaration, name the parties that it purports are willing to rescue it from its debt, state these persons' supposed qualifications, furnish dealership owner applications for them, or assert how much money any of these purported investors have agreed to contribute. Porter also nowhere avers that it has a facility from which to operate, let alone the ability to return to its former dealership premises. The evidence presented by FCA US shows that Porter actually has no prospect of returning to its former facility or operations. *See* the Declaration of Paul B. Draper, attached to the Motion as Exhibit 2, at ¶¶ 11, 16-17 (attesting to Porter's eviction, the landlord's lawsuit against Porter for over $1 million in unpaid rent and other debts, and the landlord's unwillingness to re-let the premises to Porter); *see also* the Default Judgment by Court, attached to the Motion as Exhibit 7, at ¶¶ 7-8 (ordering Porter to turn over substantially all dealership items, including inventory and equipment, and subjecting the franchise rights to repossession). In the face of this evidence, Porter's declaration offering vague and unsupported promises of future capitalization cannot be more than "little or no chance that it will reopen[.]" *Roadtrek* at ¶ 63.

Porter is also wrong to argue that *Duarte* is limited to the idea that the Board has no remedy in vehicle-line discontinuation cases. (Opposition at 4). This reads *Duarte* too narrowly; *Duarte*'s holding

applies to any situation, like this one, where the undisputed facts warrant termination. *Duarte*, 104 Cal. App. 4th at 638 (*see also* the discussion of *Duarte*, below).

As a practical matter, Porter's declaration should be disregarded by the Board in finding that the Protests are moot. Any defunct dealer could always make a promise – particularly an unsubstantiated one, as Porter does here – to reopen in the future. If that were enough to stave off dismissal, then no termination protest by a defunct dealer could ever be resolved without the lengthy evidentiary hearing that Porter has demanded. (*See* the March Protests, each at ¶ 7, requesting a 10-day hearing). Not only would such a result run afoul of the court's holding in *Duarte*, and not only would such a result be impractical and a needless waste of resources, but it would also harm the public. Since at least August 2017, the public has not had an outlet for new Chrysler, Dodge, Jeep, or RAM new vehicle sales or warranty service in Sonora. It is time to bring this matter to a close by giving effect to the notices of termination, so that FCA US may appoint a successor to serve the consuming public in Sonora.[2]

Porter's "Good Cause" Argument: Porter does not even attempt to contest FCA US's overwhelming evidence of good cause. Instead, Porter asserts that "[c]learly, there is no statutory or caselaw which supports the Board's authority" to issue a finding of good cause without a Section 3066 hearing. (Opposition at 4). This argument cannot be reconciled with the holding in *Duarte*. In *Duarte* the protesting dealer, like Porter in its Opposition, argued that the statutory scheme did not provide for a summary dismissal without a hearing. *Duarte*, 104 Cal. App. 4th at 634. In rejecting that argument, the court held the following:

> [W]e shall conclude the purpose of the Board and the goal of administrative efficiency support a conclusion that the Board has *implied authority to dismiss a protest where the undisputed facts demonstrate good cause for franchise termination as a matter of law* and afford no basis for preventing termination of the franchise. The procedure in this case was analogous to a summary judgment motion, where the franchisor established good cause for termination as a matter of law, and the undisputed facts gave [the dealer] no viable basis to prevent termination of the franchise.

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[2] Relatedly, it is not reasonable for Porter to contend that "the ongoing threat of the termination of the franchises" hampered his ability to obtain new financing. (Porter Decl. ¶ 3). Porter's inability to finance its former dealership predates this action. As Eric Wong's declaration makes clear, Porter started making vague and unsubstantiated promises about recapitalization before the September Notices were issued. (Declaration of Eric Wong, Exhibit 3 to the Motion, at ¶ 22). Moreover, the September Notices were only issued after Porter was evicted and ceased operating. (*Id.* at ¶¶ 23-25).

Duarte, 104 Cal. App. 4th at 637 (emphasis added). Porter does not address the fact that the Board has this implied authority, or make any effort to reconcile *Duarte* with Porter's construction of Vehicle Code § 3050. Rather, Porter simply repeats that it "is actively seeking to resolve the financial issues that have plagued the dealership since 2017, wants to operate the store, and has a path to accomplish that." (Opposition at 5.) This is not relevant. If it were, then no breach of any franchise agreement, no failure to operate (let alone one for eight months), no failure to serve the public, would ever be enough to warrant dismissal so long as the dealer claimed an intention to resume operations in the future. Such an exception would eviscerate the holding in *Duarte* and nullify much of the Board's inherent power to dispose of cases under its jurisdiction where there are no relevant factual disputes at issue.

The undisputed facts, supported by the evidence attached to the Motion, show that FCA US has established good cause to terminate the franchises. (Motion at 9-12). Porter marshals no evidence relevant to the good cause factors in response. Moreover, Porter has no viable basis to prevent the termination of its franchise; no evidence introduced at this point could cure the material breaches that have now persisted for months or change the fact that Porter has failed to serve the consuming public all this time. Accordingly, Porter's declaration should be disregarded as irrelevant and insufficient to raise a material issue of fact, and the Protests must be dismissed, following *Duarte's* treatment of a motion such as this one as analogous to one for summary judgment.

FCA US has shown that Porter cannot prevail on its protest, and that FCA US is entitled to dismissal under the standard set forth under *Duarte*. *See Duarte, supra; see also* Cal. Code of Civ. Proc. § 437c, subd. (p) (setting forth standards that entitle the movant to summary judgment where it has met its evidentiary burden and the party opposing the motion has failed to present a triable issue of material fact). Even though the foregoing alone is enough to warrant dismissal, it is worth noting that the Motion and the evidence in support of it are not only sufficient as a matter of law to establish good cause, they also negate each of the good-cause allegations stated in the September Protests and the March Protests. (*See* each Protest at ¶ 6 therein, which contain only a threadbare conclusion about each factor). This is a further reason why Porter's declaration cannot be enough to create a triable issue of fact or warrant an evidentiary hearing. *See Conroy v. Regents of University of California*, 45 Cal. 4th 1244, 1254 (2009)

(enforcing the rule that facts outside the scope of the pleadings are immaterial and do not defeat summary judgment); *Sinai Mem'l Chapel, supra* (stating that "cryptic, broadly phrased, and conclusory assertions, or mere possibilities" cannot create a material issue of fact).

Porter's Footnote Regarding its Loss of License: Porter argues that its loss of a dealer license does not affect the "franchise relations between the parties," for purposes of the Board's jurisdiction to hear franchisee protests. (Opposition at 2 n.1) This argument overlooks the fact that Porter, by failing to maintain its license, has breached its dealer agreements with FCA US – and that the February Notices identify such failure as a breach (among many others) committed by Porter. (Motion at 3).[3]

In any event, the Board need not engage in an analysis as to whether Porter's on-paper-only "franchise" has legal import without a dealership location, inventory, equipment, a license to operate, or even the ability to prevent the seizure of such franchise by its creditor at any time. Rather, the facts render the Protests *moot*. As the Board recognized in *Roadtrek*, the distinction between a "dealership" and a "franchise" is meaningless once the dealership has ceased operating. *See Roadtrek* at ¶ 53 ("Of course, it is the loss of the 'dealership' that is of practical significance."); *see also id.* at ¶¶ 56 – 58. Any supposed statutory distinctions among the rights of franchisees, licensees, and dealers have no effect on this conclusion.

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[3] Porter also argues that its dealer license was not actually "revoked," as would mandate a one-year delay before Porter could reapply for a license, and contends that "there will be no impediment to a restoration" of its license once it resolves its financial issues. (Opposition at 5). Again, Porter relies on unsubstantiated speculation about the future. The uncontested evidence shows that the California Department of Motor Vehicles lists Porter's license as "Not Valid". (*See* Motion, Ex. 4).

CONCLUSION

For the reasons stated above, Respondent respectfully requests the relief set forth in the Motion:

1. An order dismissing with prejudice and refusing to hear the above-captioned protests, because the protests are moot, and because the uncontested evidence shows that FCA US has good cause to terminate the Dealer Agreements; and
2. Such other and further relief as the Board deems proper.

Dated: April 20, 2018

DONAHUE DAVIES, LLP

By _____
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PROOF OF SERVICE

CAPTION: PORTER AUTO GROUP, L.P., Protestant

v. FCA US LLC, Respondent

BOARD: NEW MOTOR VEHICLE BOARD

PROTEST NOS.: PR-2534-17, PR-2535-17, PR-2536-17, PR-2537-17, PR-2555-18, PR-2556-18, PR-2557-18, PR-2558-18

I am employed in the City of Sacramento and County of Sacramento, State of California. I am over the age of 18 years and not a party to this action. My business address is 1 Natoma Street, Folsom, California 95630.

On April 20, 2018, I served the foregoing REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS PROTESTS OR, IN THE ALTERNATIVE, FOR A FINDING OF GOOD CAUSE TO TERMINATE BASED ON UNCONTESTED EVIDENCE on each party in this action, as follows:

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☑ (BY MAIL) I caused such envelope to be deposited in the United States Mail at Sacramento, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing documents for mailing. It is deposited with the United States postal service each day and that practice was followed in the ordinary course of business for the serve herein attested to.

☐ (BY FACSIMILE) The facsimile machine I used complied with California Rules of Court, Rule 2003, and no error was reported by the machine. Pursuant to California Rules of Court, Rule 2006(d), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this Affidavit.

☐ (BY FEDERAL EXPRESS) I caused such envelope to be delivered by air courier, with the next day service.

☑ (BY E-MAIL) at the e-mail address listed above. Executed on **April 20, 2018,** at Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct.

Dawne M. Camilleri